



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Chandler Marketing Group

File: B-247184

Date: May 11, 1992

Richard A. Dudden, Esq., Padley & Dudden, P.C., for the protester.

Thomas Kelly, Esq., Government Printing Office, for the agency.

Stephen Gary, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against Government Printing Office's nonresponsibility determination is denied, where contracting officer reasonably determined that protester did not comply with solicitation requirement that bidder meet contract printing requirements using its own facilities and equipment.

2. The Government Printing Office's (GPO) nonresponsibility determination of a small business properly was not referred to the Small Business Administration (SBA) for review as GPO is a legislative branch agency not subject to SBA jurisdiction.

DECISION

Chandler Marketing Group (CMG) protests the rejection of its bid under the invitation for bids (IFB) issued by the Government Printing Office (GPO) for Program C187-S, for the printing of Internal Revenue Service (IRS) training materials. CMG contends that GPO improperly determined that it was nonresponsible.

We deny the protest.

The solicitation, issued on October 2, 1991, invited bids on a 3-year requirements contract for the annual production of 100,000 to 140,000 IRS training kits, "Understanding Taxes," intended for training taxpayers in the preparation of tax returns. The IFB incorporated by reference the standard solicitation provisions found in GPO's publication, "GPO Contract Terms" (GPO Pub. 310.2, effective December 1, 1987 ((Rev. 9-88))). Paragraph No. 6 of the incorporated standard terms provides that:

"The contractor may make contracts with any other party for the furnishing of any part of the articles or work called for, with the exception that the predominant production function required in the performance of the contract shall not be subcontracted."

When bids were opened on November 6, CMG was the apparent low bidder.

During an ensuing preaward survey, CMG submitted documentation stating that it was a marketing firm:

"The Chandler Marketing Group is a direct marketing organization. . . . Direct marketing includes direct mail, telecommunications, interactive video, home shopping. . . . Our primary market is organizations providing credit services to the public: the top 500 credit card banks, large department stores, and gasoline companies."

CMG indicated that if awarded the contract, it would print the kits at the facilities of three other firms: Keystone Press (Keystone, Nebraska); Sioux Printing (Sioux Falls, South Dakota); and Buffalo Graphics (North Platte, Nebraska). With respect to its relationship with Sioux Printing, CMG explained that:

"The Chandler Marketing Group and Sioux Printing, Inc. have a corporate affiliation that is evidenced by a joint operating agreement and joint ownership. . . . Chandler Marketing Group is a Nebraska corporation whose primary shareholder is Tim Chandler. Sioux Printing is a South Dakota corporation whose primary shareholder is Dick Lewin. Each of these majority shareholders holds a primary interest in the other corporation. . . ."

Based on this and other information obtained during the preaward survey, contracting officials questioned whether CMG could comply with the IFB's limitation on subcontracting, which, as indicated above, precluded the subcontracting of "the predominant production function." Consequently, the agency advised CMG that it would not be eligible for award unless it promptly documented its ownership of the facilities and equipment it proposed to use to perform the contract. Specifically, GPO requested that by December 24 CMG provide copies of its certificate of incorporation and

The "predominant production function" in this procurement is printing.

bylaws, its most recent balance sheet, and a "completed equipment questionnaire"; GPO also asked CMG to provide, "for other assets that you wish to include for consideration (other companies, presses, etc.), proof of ownership."

On December 24, CMG responded to the request by furnishing: a balance sheet; a completed equipment questionnaire; and a copy of a check made out to Sioux Printing which it described as "our final payment" for a four-color press. In addition, CMG advised GPO that it had held meetings with Sioux Printing:

"... to discuss GPO's concerns that Chandler Marketing is acting as a 'broker' for printing. ... As part of these meetings, we discussed selling controlling interest to one person, thus creating a common management and ownership structure. At this time, we do not believe this change would be beneficial to our company's operations. ..."

GPO found CMG's response insufficient to establish compliance with the solicitation's limitation on subcontracting. Consequently, by letter dated January 3, 1992, GPO advised CMG that it had been determined nonresponsible due to its "failure to submit information requested by GPO sufficient to prove ownership of the necessary equipment and facilities to produce this requirement, in the agreed upon time." GPO thereupon issued a purchase order to the next low offeror. This protest followed.

CMG maintains that it should have been found responsible, since it allegedly provided all pertinent information requested by GPO in a timely manner.

A contracting agency has broad discretion in making responsibility determinations, since it must bear the brunt of difficulties experienced in obtaining the required performance. Although responsibility determinations must be based on fact, and reached in good faith, they are of necessity a matter of business judgment. Automated Datatron Inc., 68 Comp. Gen. 89 (1988), 88-2 CPD ¶ 481. We will not question a nonresponsibility determination unless the record shows that there was no reasonable basis for the determination. EPCO Assocs., B-238015, Apr. 13, 1990, 90-1 CPD ¶ 368. In this case, we find that GPO reasonably determined CMG to be nonresponsible.

Although CMG generally asserts that it responded adequately to GPO's information request, the protester does not claim, nor does the record otherwise show, that it furnished information establishing its ownership of the three printing firms whose equipment it proposed to use in performing the

contract. With respect to two of these firms, Keystone Press and Buffalo Graphics, CMG furnished no documentation indicating that it owned the firms or their facilities or equipment. With respect to Sioux Printing, CMG, as indicated above, confirmed that it did not own the firm and that, although it had discussed creating common ownership or management, "at this time, we do not believe this change would be beneficial to our company's operations."

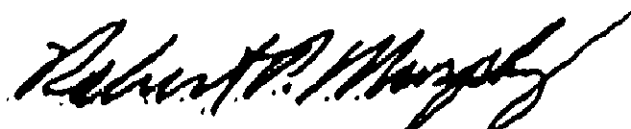
While CMG attempted to show it had purchased a printing press from Sioux Printing, this printing press was only one of eight printing presses which CMG proposed to use in performing the contract and CMG submitted nothing to indicate that it owned any of the other proposed facilities or equipment. Furthermore, we find that GPO reasonably concluded that the documentation submitted was inadequate to show ownership of even the one press. CMG furnished a facsimile copy of a check for \$50,000, dated December 9, 1991, and made out to Sioux Printing, and described this check as its final payment for the press. As noted by the agency, however, the check bears the printed company name of Chandler Management Group, and not the name of the bidder, Chandler Marketing Group; at the time of submission, the check had not cleared the bank on which it was drawn; and CMG failed to submit any proof of a transfer of title, such as a sales contract, sales receipt or document of title. We conclude, therefore, that GPO reasonably determined that CMG had not established that it could, as required by the solicitation, perform the "predominant production function" with its own resources, rather than by subcontracting the printing, and that CMG therefore was nonresponsible. See Mitchell Constr., Inc., B-245884; B-245884.2, Jan. 17, 1992, 92-1 CPD ¶ 92 (capability of performing in compliance with subcontracting clause a matter of responsibility); Murdough Constr., Inc., B-245133, Aug. 14, 1991, 91-2 CPD ¶ 150.

CMG complains that GPO failed to refer the nonresponsibility determination to the Small Business Administration (SBA) for consideration under its certificate of competency procedures. GPO, however, is a legislative agency to which the Small Business Act and SBA's certificate of competency procedures do not apply. See Ery Comms., Inc., 62 Comp. Gen. 164 (1983), 83-1 CPD ¶ 109. CMG also complains that GPO, in the administrative report on the protest, now argues

CMG's apparent intent to subcontract some or all of the printing is also reflected in the statement in its comments on the administrative report that CMG had "made agreements with other suppliers and printing companies to assure deliveries of merchandise and printed material." (Emphasis added.)

that CMG failed to comply with the requirement in the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1988), that the firm be a regular dealer in, or manufacturer of, the supplies offered. Since, however, GPO reasonably found CMG nonresponsible based on its failure to comply with the solicitation limitations on subcontracting, we will not consider matters relating to other possible bases for finding the firm nonresponsible. In any case, we will not review a contracting agency's determination of an offeror's legal status as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act, since such determinations are to be made in the first instance by the contracting agency, subject to appeal to the Secretary of Labor. See Southwest Forms Mgmt. Servs., 56 Comp. Gen. 953 (1977), 77-2 CPD ¶ 183; Mark Turulski, B-245592, Jan. 14, 1992, 92-1 CPD ¶ 65.

The protest is denied.


for James F. Hinchman
General Counsel